
(1988) 02 AHC CK 0039
In the Allahabad High Court
Case No : F.A.F.O. No. 868 of 1987

Shabbir and Another

APPELLANT

Vs

Ashfaq Ahmad and Another

RESPONDENT

Date of Decision : 09-02-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A, Order 43 Rule 1, 104(4)

Citation : AIR 1988 All 223 : (1988) 1 AWC 504 : (1989) RD 130

Hon'ble Judges : N.N. Mithal, J

Bench : Single Bench

Advocate : P.K. Singhal, for the Appellant; S.M. Chaturvedi, for the Respondent

Final Decision : Dismissed

Judgement

N.N. Mithal, J.—This F. A. F. O. purports to be under Order 41, Rule 1(r), C P. C. For the caveator Sri S.M. Chaturvedi has raised a preliminary objection before admission of this appeal that no appeal against the impugned order lies.

2. To appreciate the controversy a few facts may first be taken note of. On dismissal of their suit by the trial Court the respondents filed Civil Appeal No. 23 of 1980 and obtained an interim order from the appellate court on 1-2-1980 directing the parties to maintain status quo. It appears that the appellants violated this injunction giving rise to an application under Order 39, Rule 2-A(i) C. P. C. This application was allowed on 18-7-1980 and the court ordered proceedings to be drawn up against the appellants for violating the injunction. Aggrieved by the order the appellant filed an appeal (F. A. F. O. No. 406 of 1980) before the High Court which was dismissed on 3-8-1984. After this, 7-10-1986 was fixed in the appeal (No. 23 of 1980) but on account of default of parties on that date it was dismissed, although it was subsequently restored on 25-5-1987. In the meantime, on 24th Dec., 1986 the respondent moved an application seeking enforcement of order dated 18-7-1980. The appellants objected to this contending that order dated 18-7-1980 could not be enforced since the appeal wherein the interim order had been passed had been dismissed" and between

3-8-84 and 25-5-1987 no appeal was pending. Consequently even the order dated 1-2-1980 did not exist. This plea did not find favour with the trial court and the objection was overruled by the impugned order giving rise to the present appeal.

3. The objection of the respondent to the maintainability of the appeal is that an appeal under Order 43, Rule 1(r) lies only against an order passed under any of the Rules 1, 2, 2-A, 4 or 10 of Order 39. Since the order does not fall under any of these provisions no appeal lay. From the facts narrated earlier it will be apparent that the impugned order was passed on an application seeking to enforce an order finally adjudicating matter under Order 39, Rule 2-A(i), C.P.C. The order in question is apparently not one under Rules 1 or 2 or even under R, 10 of Order 39. Order dated 18-7-1980 was passed against the appellant as a consequence of violation of injunction order dated 1-2-1980 by him. It was in fact that order which was one under Rule 2-A of Order 39, and was later confirmed by the High Court on 3-8-1984 in F.A.F.O. No. 406 of 1980. Thus the order passed under Order 39 Rule 2-A (i) to proceed against the appellant for violating the interim injunction stood finally adjudicated already. Any subsequent order passed to enforce such an order cannot be said to have been passed under the provisions of Order 39, of the Code. At the best such an order would be in the nature of an order for the execution thereof.

4. The appellant next tries to urge that the appeal would lie u/s 104(h) C.P.C. In my opinion, provision of that section do not really help the appellant. The relevant provision may first be extracted here:

Section 104 : Orders from which appeal lies: --

(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders : --

(h) An order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree :

Thus for the applicability of these provisions there are two pre-conditions; (i) there should be an order imposing fine or directing arrest or detention in the Civil prison of a person and, (ii) that such an order must have been passed under any of the provisions of the Code, orders in execution proceedings excepted. Obviously, the order satisfies the first of the two conditions as it was an order directing arrest and detention of the appellant in civil prison but there is nothing to show that this order had been passed under any of the provisions of this Code. The initial order dated 18-7-1980 was of course passed under Order 39(2)(A)(i), C.P.C. and was accordingly appealed against. However, the order which is now being assailed had not been passed under any of the provisions of the Code. In fact after the order dated 18-7-1980 had become final the same had only to be enforced for which even making of a formal application for that purpose was not

necessary. Even if the attention of the court had been drawn to the order of confirmation passed by the High Court, the court was under duty to enforce the same. If a formal application seeking its enforcement had been made, it would not alter the legal position and it would not be possible to say that the order was passed under some provision of the Code. Sri P.K. Singhal, for the appellants was unable to point out any provision because of which the impugned order could come within the scope of Section 104(h). It is, therefore, quite obvious that the appeal is neither maintainable under Order 43, Rule 1 nor u/s 104, C.P.C.

5. An attempt was made to urge that on the dismissal of the appeal in default on 7-10-1986 the interim order of injunction passed by the Court earlier on 1-2-1980 came to an end and even on its restoration on 25-5-1987 that order would not revive automatically if no specific order was passed by the Court for reviving of the interim order. His contention, therefore, was that there subsisted no injunction on the dismissal of the appeal such as could be enforced against him and the Court had no jurisdiction to enforce the same. It is, however, not necessary to go into the controversy here at this stage as this may have been relevant only when the appeal was held to be maintainable. Since I have held that no appeal against the impugned order lies, I would prefer to leave the matter here without expressing any opinion on merits.

6. In the result the memo of appeal is rejected as not maintainable.